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**Control of Alcohol and Drug Use: Expanded Application of Random Testing
and Other Requirements to Foreign Railroad Foreign-Based Employees Who
Perform Train or Dispatching Service in the United States**

Final Regulatory Evaluation

Federal Railroad Administration
Office of Safety Analysis
September 15, 2003

Control of Alcohol and Drug Use: Expanded Application of Random Testing and Other Requirements to Foreign Railroad Foreign-Based Employees Who Perform Train or Dispatching Service in the United States

1.0 Background

Without the changes enumerated in the Final Rule, foreign railroad, foreign-based employees (FRFB employees) who perform train or dispatching services (i.e., "covered" employees) in the United States would only be governed by the general conditions required by the Federal Railroad Administration's (FRA's) alcohol and drug regulations (such as prohibitions on the use of alcohol and drugs on the job, and post-accident testing). These FRFB employees would not be subject to the additional requirements of part 219 that govern co-worker reporting and employee assistance programs, pre-employment testing, and random alcohol and drug testing. Realizing the need for additional alcohol and drug program requirements, Congress passed the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act). The Omnibus Act directs Department of Transportation (DOT) agencies to update the requirements of their alcohol and drug programs, while taking into account the laws of foreign nations. Under the auspices of the Omnibus Act, FRA has worked to improve safety of domestic railroad operations and of those that enter the U.S. from Canada and Mexico with the promulgation of this Final Rule. In so doing, FRA has consulted with the governments of Canada and Mexico, and with those foreign railroads that operate in the U.S., to establish a Final Rule with regard to the laws of our neighbors. The Final Rule and this regulatory evaluation of the Final Rule, reflect the discussions with Mexico and Canada, and other comments received following publication of the NPRM for this rulemaking.

2.0 Problem Statement

The easing of trade restrictions in the marketplace as a result of the North American Free Trade Agreement (NAFTA) has increased the amount of rail traffic between the U.S., Mexico, and Canada. NAFTA represented a major shift in the railroad operating environment. For example, in 1997, about 38,000 trains crossed into the U.S. from Mexico and Canada (as reported by the United States Customs Service). For the year from May 2001 to April 2002, a total of 41,000 trains entered the U.S. from Canada and Mexico, almost an 8% increase. Additionally, from April to December of 1993 through 2002, the total value of U.S.-Mexico merchandise trade by rail increased (in current dollars) from about \$8 billion to \$31 billion; for Canada, the corresponding increase was from about \$24 billion to \$61 billion. (U.S. Department of Transportation, Bureau of Transportation Statistics, "U.S. Merchandise Trade with Mexico by Rail, April 1993 - December 2002,"

http://www.bts.gov/ntda/tbscd/reports/us_mex_2002_Rail.html (March 2, 2004). U.S.-

Canadian data is available from the same source at http://www.bts.gov/ntda/tbscd/reports/us_can_2002_Rail.html.¹

Another structural change in the marketplace has been the increasing consolidation of North American railroads. Canadian railroads have acquired several large U.S. railroads, and U.S. railroads have cooperated financially and logistically with Mexican railroads. Increased consolidation will likely lead to more cross-border operations.

FRA feels that increased safety should match increased cross-border railroad operations. FRA is concerned about trains carrying hazardous materials that operate into the U.S. with FRFB employees who are not subject to all of the requirements under part 219. FRA also notes that some foreign railroad operations extend for significant distances into the U.S., into highly populated urban areas. The risk for significant harm exists. To date, cross border operations appear to have a safe accident history, with not many incidents so severe to warrant FRA post-accident testing, but the potential for harm is present and rising.

FRA is also concerned that a failure to include FRFB employees in all the requirements of part 219 may erode domestic support for part 219. Railroads, and their employees, may come to increasingly resent the fact that they are subject to certain provisions of part 219, such as random testing, that FRFB employees operating on U.S. soil are not subject to, simply because they came from over the border.

Through its own experience, FRA has seen a decrease in drug and alcohol usage among U.S. railroad employees in safety sensitive positions as a result of part 219. For example, as stated in the Final Rule, after mandated random alcohol and drug testing, the rate of positive drug tests fell from 1.04% in 1990 to 0.77% in 2002. FRA has also witnessed the tragic harm an impaired employee can cause. In 1987 (before required random drug testing), an accident happened in Chase, MD which resulted in 16 casualties and 174 injuries. Marijuana use was cited as a cause in the accident. Other countries have substance regulations also, but FRA feels that they are not equivalent to U.S. laws. For example, Canadian regulations lack random testing. FRA feels random testing is a necessary part of alcohol and drug programs because of its strong deterrent effect. FRA's earlier regulation efforts with industry self regulation of alcohol and drug misuse were not as effective. Employees were not willing to identify their coworkers who were

¹ In 1999 and 2002, Canadian National Railway Company (CN) merged with Illinois Central and Wisconsin Central Railroads. CN currently has a proceeding pending before the Surface Transportation Board in which CN is seeking authority to acquire three small U.S. carriers (the Duluth, Missabe, and Iron Range Railway Co., the Bessemer and Lake Erie Railroad Co., and the Pittsburgh & Conneaut Dock Co.).

impaired because of alcohol or drugs (a behavior known as the conspiracy of silence). No other method is available in the marketplace to ensure that FRFB employees will not be impaired. The potential for an impaired employee to cause significant harm to lives and property causes FRA to establish the requirements in the Final Rule.²

3.0 Approach

In the Final Rule, FRA seeks to enhance safety while giving consideration to the laws of Canada and Mexico, to the extent compatible with this enhanced level of safety. Unlike the NPRM, the Final Rule does not apply part 219 to all FRFB employees. Rather, it reduces regulatory burden significantly by differing from the NPRM in several ways, summarized below:³

1. By permitting FRFB employees to enter into the U.S. (to perform train or dispatching service) up to 10 route miles (10-mile limited haul exception) and remain excepted from subparts E, F, and G of part 219. Parts E, F, and G concern employee assistance programs, pre-employment testing, and random alcohol and drug testing, respectively.⁴
2. By providing a process for foreign railroads to petition FRA for a waiver from subparts E, F, and G of part 219.
3. By allowing foreign railroads to conduct FRA-required testing on U.S. territory, and not mandate that it be done in the foreign country. Foreign railroads (or contractors employed by foreign railroads) may collect specimens either in the U.S. or in the railroads' originating country, as long as DOT workplace testing methods are followed (49 CFR part 40).
4. By providing an option for foreign railroads to propose a substitute workplace testing program. Such a program must be a compatible alternative to subparts B (the return to

²As stated earlier, the Final Rule also fulfills the mandates of the Omnibus Act.

³Please see the Final Rule for more detail.

⁴Note that FRFB signal maintenance employees are already excepted because of their minimal impact on U.S. rail operations.

service mandates), E, F, and G of part 219; and it must use testing procedures, criteria, and assays reasonably comparable in effectiveness to all applicable provisions of DOT's procedures for workplace drug and alcohol testing programs (49 CFR part 40). If approved by FRA, the foreign railroad must have on file a letter stating that it has chosen to follow the alternative program for its U.S. activities.

The 10-mile, limited haul exception excepts those foreign railroad operations which extend into the U.S. for short distances. These shorter segments are deemed to pose much less risk than longer runs, and accommodate the reasonable operational needs of the carriers. Excepting the short-distance, cross-border operations facilitates train interchange between countries as well. Foreign railroads that wish to expand their operations for distances greater than 10 miles into U.S. territory will be subject to subparts E, F, and G of part 219 unless a waiver is sought and granted. With this limited haul provision, most Canadian and all Mexican operations will continue to be excepted.

This analysis estimates incremental safety impacts and monetary costs expected to accrue over the next twenty years as a result of the changes in part 219 as explained in the Final Rule. Costs and benefits that are not a result of provisions in the Final Rule are not counted. Regulatory requirements that are already being performed voluntarily do not represent a burden and are also not counted. Many of the cost estimates contained in this analysis are based on the FRA Information Collection Submission to the Office of Management and Budget of the United States (OMB) for part 219 that was submitted in 2002. This information is updated and submitted to OMB for approval every three years. The information collection costs contained in this submission are based on the experience of currently affected entities, including railroads, their employees, laboratories, and FRA. All monetary values presented in this analysis are in U.S. dollars, unless otherwise specified.

4.0 Findings

This Final Rule is promulgated to increase safety of cross-border railroad operations. Increasing cross-border operations have the potential for causing severe accidents. Increasing applicability of part 219, while targeting the most risky operations of foreign railroads that operate into the U.S., aims to strike a balance between the public good of enhancing safety and limiting private sector impacts.

The following table presents estimated twenty-year NPV costs for the Final Rule, categorized by subparts E, F, and G of part 219. Costs are also shown for forming an alternative, compatible substance abuse program (rounded for presentation).

TOTAL COSTS

Description	Estimated 20 Year NPV Costs
Subpart E (Voluntary referral and co-worker identification, employee assistance programs)	\$2,726
Subpart F (Pre-employment testing)	\$10,646
Subpart G (Random alcohol and drug testing)	\$69,741
Alternative, compatible program and review	\$359
Miscellaneous	\$3,000
Total	\$86,472

FRA expects that overall the requirements of the final rule will cost the rail industry approximately \$90,000 Net Present Value (NPV) over the next twenty years. These costs are detailed in the narrative sections to follow and in Exhibit 2 (at the back of this document).

FRA believes it is reasonable to expect that injuries and/or fatalities will be avoided over 20 years as a result of implementing the changes, although identifying the extent of the projected safety improvement is difficult because cross-border event data has not been separated in FRA's database. FRA also believes that the safety of domestic rail operations could be compromised if these standards are not implemented.

5.0 Railroads and Employees Affected

This section identifies the main entities that will be subject to the Final Rule.

Railroads

The Final Rule contains tables of Canadian and Mexican railroad operations in the U.S. Under the 10-mile limited haul exception, only 6 operations are not excepted. Of these, 5 are CN operations and 1 is a St. Lawrence & Atlantic Railroad Inc. (SLR) operation. All Mexican operations are excepted. This final regulatory evaluation retains the NPRM assumption that

there will not be any new Canadian railroads, and 2 new Mexican railroads in years 5 and 10 of the 20 year period of analysis. FRA does not have information, however, that these new railroads (or expanded operations of existing railroads) will extend into the U.S. beyond 10 miles. All current Mexican operations enter the U.S. for less than 1 mile.

Employees

By excepting most train operations, most employees will be excepted too. Even retaining the assumption that Mexican FRFB employees will increase because of more trade and cheaper wage rates in Mexico, it is probable that the majority of employees will still be excepted.⁵ As stated above, new employees may still not operate further than 10 miles into U.S. territory without being subject to all the requirements of part 219. Given historical experience, this evaluation assumes that the number of Mexican FRFB employees that will potentially operate beyond the 10-mile limited haul exception will be small, and therefore not significantly affect the costs of this rule. With regard to Canadian operations, Canadian representatives informed FRA that they are not planning to increase the number of FRFB employees, as was noted in the NPRM. This evaluation also assumes no FRFB employee from either Canada or Mexico will perform dispatching services in the U.S.

For operations not excepted, information provided to FRA indicates that there are 65 CN and 11 SLR employees on average that will not be excepted, for a total of 76. CN also lists 373 spareboard employees that could be called to service to fill in for regular employees. Regarding spareboard employees, a Canadian railroad commented that the cost of including spareboards in random testing pool should be taken into account. FRA notes that there are lower cost methods to organize a random test pool. A test pool may consist of trains that cross the border, or job types, rather than of employee names. It would be the employees' choice to serve on a train subject to part 219. In recognition of this comment however, FRA will also account for some spareboard employees that may be tested (estimated at 30% of the regular employees, or 23 employees), but feels not all spareboard employees need to be included in the pool. With spareboard employees, $(76 + 23) = 99$ total employees are affected. This figure is rounded up to 100 for convenience.

6.0 Application of Drug and Alcohol Requirements to FRFB Train Employees Who Engage in Train Operations in the United States

⁵The NPRM regulatory evaluation assumed that there would be an annual increase in employees of 10%, and 60 new employees corresponding to the 2 new Mexican railroads in year 5 and 10 of the rule.

FRA limits applicability to those foreign railroad operations that enter into U.S. territory by more than 10 route miles. In general, part 219 applies to all railroads on the general system, commuter, and short-haul service unless excepted. Tourist, scenic or excursion operations on tracks that are not a part of the general system are exempt. Small railroads (small entities) that have 15 or fewer total covered employees, and do not operate on the tracks of another railroad or engage in other joint operations (except for interchange) are excepted from subparts D (reasonable cause testing section), E, F, and G. Small railroads with fewer than 400,000 total employee hours are exempt from subpart I. FRFB train employees who perform, or are assigned to perform, such train operations in the United States are currently subject to 49 CFR Part 219 subparts A (general requirements and definitions), B (prohibitions), C (post-accident toxicological testing), D (mandatory reasonable suspicion testing and authorized testing for reasonable cause), H (procedures and safeguards for urine drug testing and for alcohol testing), I (annual report), and J (recordkeeping requirements) when operating in the United States, unless they are exempted. See the Final Rule for detailed applicability requirements.

7.0 Costs

Wage Rates

Following the NPRM regulatory evaluation, Mexican wage rates are estimated at 21% of U.S. labor rates. This estimate is based on information provided by the Matamoros Economic Development Committee, and reflects higher wage rates along the Mexican-US border in comparison to other areas of Mexico. Wage rates are burdened by 40 percent to include general and overhead expenses as well as fringe benefits. Comparing average railroad wage rates in Canada and the U.S. (using 1996 data from Statistics Canada and Industry Canada, and U.S. Department of Commerce, respectively), Canadian wage rates are 77% of U.S. wage rates. Exhibit 1 presents average annual railroad wages in the United States by employee group. Note that information available to FRA indicates that Canadian *train crew* labor rates are comparable to U.S. train crew labor rates. Thus, costs associated with the compensation of Canadian train employees that operate in the United States are the same as those for domestic train employees.

The Association of American Railroads (AAR) publishes Class I railroad average annual compensation rates for various employee groups in the U.S. Labor rates used in this analysis are calculated by burdening the AAR rates by 40% to include employee fringe benefits and overhead. Exhibit 1 presents these labor rates. Unless otherwise stated, labor rates for Canadian and Mexican employees are based on the AAR rates adjusted to reflect overall differences in pay rates in Canada and Mexico.

The following sections present cost estimates for the distinct requirements that will apply to FRFB train employees and their employing railroads under the FRA Final Rule.

Subpart E - Identification of Troubled Employees

This subpart will require each railroad that employs FRFB train employees to adopt, publish, and implement a voluntary referral policy and a co-worker report policy or alternate policies having as their purpose the prevention of alcohol or drug use in railroad operations, if such a policy has the written concurrence of the recognized representative of such employees. The policies will be designed to allow FRFB train employees with drug or alcohol use problems to seek treatment and rehabilitation without losing their jobs. These employees will be allowed to either refer themselves or be reported by co-workers, take a leave of absence to receive treatment, and, once rehabilitated, return to service on the recommendation of a Substance Abuse Professional (SAP). In addition, employees that are reported by co-workers will have to be tested once before returning to duty and at least 6 times unannounced during the following 12 months.

In comments received on the NPRM, Canadian railroads indicated that there would be an additional cost associated with the railroad's Chief Medical Officer (CMO) review of an employee for fitness for duty before an employee would be allowed to return to work. CMO approval would be acceptable to FRA, however, this analysis is not including a cost for a CMO because it is a Canadian requirement and this analysis assesses only costs resulting from the requirements of this rule.

FRA notes that it has worked closely with Transport Canada and several of the Canadian railroads. In so doing, those railroads briefed FRA that they had Employee Assistance Programs (EAP) very similar to this requirement. It is envisioned that they will not have to alter their current programs to a large extent to become compliant or to have an acceptable program.

The co-worker report policy will allow an employee to maintain employment with the railroad following an alleged first offense under part 219 or the railroad's own alcohol and drug rules, subject to the conditions and procedures of the subpart. A co-worker will be able to report an employee who appeared to be unsafe to work with or was in violation of the railroad's drug and alcohol rules. The reported employee will have to contact the SAP, who will interview him or her and complete an evaluation. If the SAP determined that the employee had a substance abuse problem, the employee will have to successfully complete a treatment and rehabilitation program approved by the SAP before returning to work. Again, railroads will have to grant employees a leave of absence of not less than 45 days to seek necessary treatment and rehabilitation.

Canadian railroad representatives indicated, in comments to the NPRM, that there would be additional costs associated with the railroads being required to pay sick leave, rehabilitation, and reasonable accommodation costs for any employee that is determined to have a substance-abuse problem under the Canadian Human Rights Act. Again, as these costs do not result from provisions of this rule, this analysis is not including these costs.

Alternate policies and any amendments made to them, as well as revocations, will have to be filed with the FRA Associate Administrator for Safety. No domestic railroads already covered by the rule have opted to file alternate policies to date. At most, two Canadian railroads would submit an alternative policy. Costs for formulating policies are included in item (1) below.

The NPRM separated subpart E costs by the following categories:

1. Development and Publication of Voluntary Referral and Co-Worker Report Policies
2. Report by Co-Worker
3. SAP Evaluation
4. Leave of Absence
5. Return to Work

As the heading for the first category describes, the first cost is for formulating policies to prevent alcohol and drug misuse in railroad operations. In forming this policy, the foreign railroad can address the policy for review by a CMO. Per the NPRM, FRA estimates that it will take about 38 hours to develop the policy, plus 2 hours to review it, for a total of 40 hours. Also following the NPRM, FRA discounts this estimate by 50% (to 20 hours) for the experience that Canadian railroads have with compliance matters, and the assistance they can seek from their U.S. partners. It is assumed that employees in the Professional and Administrative group will spend 19 hours on this effort, while employees in the Executives, Officials, and Staff Assistant group will review the policy for 1 hour. Costs are estimated as (rounded here and in subsequent calculations for presentation, please see Exhibit 2 for detail):

Executive group salary (Canadian)	=	0.77 x \$54.85 =	\$42
Professional group salary (Canadian)	=	0.77 x \$34.14 =	\$26
(19 hours x \$26) + (1 hour x \$42) x 2 railroads =			\$1083
20 Year NPV Cost (Form Policy) =			\$1012

A 7% discount rate was used, per DOT policy. As no new entrants are expected, this cost is a one-time cost incurred in year 1.

In accounting for the second cost item for this subpart, Report by a Co-Worker, FRA estimates that it takes an average of 5 minutes for a co-worker to report a covered co-worker. Such reports are often made anonymously by telephone, or in writing. The NPRM approximated 100,000 domestic railroad employees are covered by co-worker report policies and that their employing railroads receive a combined total of approximately 200 co-worker reports annually. That is, for every 500 employees, one such report is filed. Given the low rate of reporting, the low number of employees affected (100), and the low cost representing 5 minutes of labor, this cost is not significant. It will be accounted for in a Miscellaneous cost category in estimating the total costs of this rule.

SAP Evaluations are performed to assist employees who are experiencing substance abuse problems that may ultimately affect their safety as well as that of others. The NPRM estimated a service cost of \$300, and an usage rate of 1 SAP evaluation per 142.857, or $(1 / 142.857) = 0.007$. As covered employees will have the option of refusing SAP evaluations and they are not paid by railroads to be evaluated by SAPs, their time spent on the evaluations is considered voluntary and is not included in this analysis. Since refusing an SAP evaluation will probably result in termination of employment for covered employees, this analysis assumes that covered employees will not waive such evaluations. Costs for SAP evaluations are estimated as follows:

Service Cost (Canadian) =	$(0.77 \times \$300) =$	\$231
SAP Evaluation Usage Rate =		0.007
Number of Employees Affected =	$(0.007 \times 100) =$	0.7
 (\$231 x 0.7 employees) =		 \$162
 20 Year NPV Cost (SAP Evaluation) =		 \$1713

As previously mentioned, Canadian railroads indicated that there will be an additional cost associated with the railroad's CMO review of an employee for fitness for duty before an employee will be allowed to return to work. This analysis is not including a cost for a CMO due to the fact that it is a Canadian requirement and this analysis assesses only the requirements of this rule.

For Leave of Absence costs, if the SAP determines that an employee is affected by psychological or chemical dependence on alcohol or a drug, the railroad will have to grant the train employee a leave of absence to undergo treatment and establish control over the problem. The voluntary referral and co-worker report policies will have to allow for at least 45 days for treatment and rehabilitation.

Comments by Canadian railroad representatives indicated that there will be an additional cost associated with the railroads being required to pay sick leave for any employee that is determined to have a substance-abuse problem under the Canadian human rights laws. Again, this analysis is not including a cost for sick leave because it solely a Canadian requirement and this analysis assesses only the costs and benefits resulting from this rule. FRA does include some spareboard employees that may substitute for those that will not be able to work while undergoing treatment and rehabilitation. FRA notes that the costs for rehabilitation would be incurred in absence of the rule as employees participate in rehabilitation programs at the insistence of family, friends, or their employer. Finally, it should be realized that a FRFB employee that cannot work in the U.S. because of this rule can work in his or her home country.

Evaluation costs before the rehabilitated employee returns to work are deemed Return to Work costs. These costs are already included in the SAP Evaluation cost above.

Subpart F - Pre-employment Drug Tests

Prior to the first time an FRFB employee performs train or dispatching service covered by the hours of service laws in the United States, he or she will have to be tested for drugs. The Final Rule permits an exception to this subpart for foreign railroad operations that extend into the U.S. for 10 route miles or less. The Final Rule also exempts all current FRFB employees from pre-employment testing. Thus, only those first time FRFB employees who will work on train operations that extend further than 10 miles into the U.S. will be subject to this part. These operations are those of Canadian railroads CN and SLR.

To accommodate increased cross-border rail traffic, and train employee turnover, FRA expects that a number equal to 10 percent of total FRFB train employees will be pre-employment drug tested annually for the next twenty years. Thus, $(.10 \times 100 \text{ employees}) = 10 \text{ employees per year}$.

In comments to the NPRM both major Canadian freight railroads asserted that they have recently revised their alcohol and drug programs to make them more comprehensive, and include pre-employment and pre-assignment testing. Due to the fact that these railroads already have pre-

employment drug testing programs in place voluntarily, costs for Canadian railroads might be overestimated.

Part 219 Subpart H -- Procedures and Safeguards for Urine Drug Testing and for Alcohol Testing-- specifies procedures for the conduct of drug and alcohol tests. The tests are reasonably simple while providing for redundant verification of identity and avoiding unnecessary disclosure of the name of the person tested. In summary, the procedures include the use of a Chain-of-Custody Form which maintains control and accountability of the specimen from collection to final disposition, labels and seals to uniquely identify the specimen, and laboratory testing requirements.

Information available to FRA indicates that the average cost of urine sample collection supplies, and laboratory charges are \$35 each, for a total of \$70 per test. Employee time is estimated at approximately 15 minutes (0.25 hour) each for the train employee and the Professional and Administrative type employee that collects the sample – travel time is not included for the train employee since that employee will not yet be performing covered service and will probably be on a familiarization trip or filling out paperwork related to the hiring or transferring process at a location where the sample could be collected. Costs are estimated below as:

Professional group salary (Canadian) =	0.77 x \$34.14 =	\$26
Transportation, train (employee) salary (U.S. comparable) =		\$35
Labor per test = (.25 hour x \$26) + (.25 x \$45) =		\$18
No. of Tests = 0.10 x 100 =		10 tests per year
Annual Cost = (\$70 x 10 tests) + (\$15 x 10 tests) =		\$878
20 Year NPV Cost (Collect, send, test specimen) =		\$9300

As enumerated in the NPRM, other costs exist to check the accuracy of laboratories through blind tests. The NPRM assigned a 20 year NPV cost of about \$200 for 270 total FRFB employees from Canada, the current affected pool of 100 FRFB employees will account for less than half that amount. Because of the rather small amount over 20 years, costs for blind tests are included in Miscellaneous costs. Similarly, costs for reviewing positive tests by a Medical Review Officer (MRO), employees providing supplementary information regarding a positive test, employees requesting a copy of their test results, employees asking for the split sample be tested (essentially a retest) were low in the NPRM and are even lower reflecting the exceptions in the Final Rule. In the NPRM, these costs summed to about \$307 over 20 years (NPV) for

Canadian FRFB employees, and will be of course much lower with fewer affected FRFB employees. Further, the low incidence of positive tests - 2% - limit the review and retest costs associated with a positive test. These costs are minimal and also included in a Miscellaneous account.

Negative Test Results

Almost all drug tests are negative. An average of approximately 99 percent of drug test results are negative, including those that are initially positive, but for which there is medical justification. FRA estimates that 99 percent of test results will also be negative for FRFB employees and applicants. FRA further estimates that it takes an MRO 10 minutes (0.166 hours) to prepare a letter of transmittal of the negative test result, forward it to the employee, and prepare and forward the necessary documentation to the railroad officer. FRA uses a standard hourly wage rate of \$100 for domestic MRO's. Costs (rounded) are itemized below:

MRO Salary (Canadian) = $0.77 \times \$100 =$ \$77

MRO Salary for 1 negative test result transmittal = $(0.166 \times \$77) = \13

No. of Tests per Year = $0.10 \times 100 =$ 10

No. of Negative Tests per Year = $0.99 \times 10 =$ 9.9

Yearly Cost = $(\$13 \times 9.9) =$ \$127

20 Year NPV Cost (Negative Tests) = \$1346

Subpart G - Random Alcohol and Drug Testing

As noted, with the 10-mile limited haul exception of the Final Rule, most FRFB employees will be excepted from subpart G. With the provision, 2 railroads, CN and SLR, representing 100 FRFB employees are affected.

The regulatory evaluation accompanying the NPRM provided detailed explanations of the types of activities and costs that would result from applying subpart G. The reader is referred to the NPRM regulatory evaluation, and of course part 219 for detailed information. The discussion below presents significant cost items resulting from the Final Rule. The costs are estimated in

the same manner as in the NPRM regulatory evaluation, but for the reduced set of FRFB employees affected under the Final Rule. The accounting sheet is attached as Exhibit 2

Program Development

The 2 Canadian railroads will need to develop random alcohol and drug testing programs to ensure that selection of cross-border trains, jobs, or employees is performed according the standards in the subpart.

As a result of comments to the NPRM, FRA currently estimates that it takes a Professional and Administrative type employee approximately 16 labor hours to develop and submit each program (a plan for alcohol and a plan for drug testing, for a total of 32 hours) to FRA. This burden is an average of an estimate of 8 to 24 hours submitted to FRA. FRA review and approval of programs currently takes an average of 1 labor hour each, for a total of 2 hours. As in the NPRM, this analysis assumes that an employee at GS-14, step 1 reviews and approves the programs.

This development cost is a one-time cost occurring in year 1 of the analysis. Total twenty-year (NPV) costs associated with Canadian railroads developing random alcohol and drug testing programs are estimated to be \$1,572. FRA review costs are relatively minor as only 2 hours are needed.

The rate of amending plans is small (10%), and would not be labor intensive once the plan is already developed. Costs for amending the plans are negligible. As there are only 2 railroads, the labor cost to review any changes should also be slight. Note that even these projected costs may be high. Both railroads have U.S. affiliates with random testing programs on file with FRA. One or both railroads may elect to utilize a similar plan, reducing their development costs.

Notice to Employees

Railroads will have to develop employee notices informing affected FRFB employees that they will be subject to subpart G. Developing such notices is also a one-time cost. The NPRM regulatory evaluation approximated that such a task would take 10 hours. Total twenty-year NPV costs are \$491 for this task.

A roughly equivalent cost is the cost to notify employees of a test somewhat in advance so that they may be present at the proper time and place for the test. Using current FRA random alcohol and drug testing rates (10% and 25% respectively), annual costs are estimated at about \$41, with twenty-year NPV costs totaling \$440.

Annual Random Selection Procedures for Alcohol and Drug Testing

In addition to the one-time cost for developing a testing program, railroads will incur yearly costs for specifying random selection procedures. Statistical software eases the burden for selecting a random sample for program testing. FRA also has available guidance for proper random selection. Following the assumptions in the NPRM regulatory analysis, 48 hours per year are allocated to develop and file documentation for randomly selecting test units (48 hours each for alcohol and drug testing). As the number of FRFB train employees covered by the modification will be relatively low for each of the employing foreign railroads, this analysis assumes that it will take approximately one-half of the usual level of effort for Canadian railroads.

Total twenty-year (NPV) costs associated with Canadian railroads developing and filing random selection documentation for alcohol and drug testing are estimated to be \$26,735. This cost is the second largest cost for complying with subpart G.

Positive Test, Refusing a Random Alcohol and/or Urine Test

The costs associated with positive test results and from refusing a test are grouped because they both result in similar enforcement actions, with a refusal causing the more severe penalty of the employee being removed from service for 9 months. FRA notes that the FRFB employee who wishes not to be tested may elect to work in his or her home country. FRA anticipates the cost of a positive test result to be low because the rate of positive test results is low (about 1% to 2%). FRA also estimates that the costs resulting from test refusals to be low because it anticipates few test refusals in practice. For an initial brief transition period the refusal rate may be higher for Canadian railroads than is currently experienced by U.S. railroads, but, as noted in the Final Rule, there have not been significant refusals to being tested in response to FMCSA drug testing programs. Thus, the estimated costs of a positive test result and refusing a test are minimal and included in the Miscellaneous account.

Another reason for an employee not taking a test may be because of sickness or other extenuating circumstances. In these cases, an employee would ask permission to be excused from a test. Based on FRA's experience, the percent of employees requesting excusal from a test is very small, at about 1%. This cost is also included in the Miscellaneous category.

Random Alcohol Tests

Railroads will have to use Evidential Breath Testing Devices (EBT) to conduct and record random alcohol test results. Commenters indicated that they can use EBT's without difficulty.

FRA currently estimates that it takes approximately 15 minutes for a Professional and Administrative category employee to conduct a random breath test and an average of one hour to travel to and from an employee's work site. As before, this analysis does not include travel time for the employee tested as it will probably be less disruptive to train schedules for the employee administering the test to go to the site where the employee to be tested is located. Note that the Final Rule allows testing in the U.S. or in the FRFB employee's home country.

Total twenty-year (NPV) costs associated with Canadian railroads administering random alcohol tests to foreign train employees operating in the U.S. are estimated to be \$4,669.

If the alcohol tests show alcohol concentrations exceeding standard limits, a confirmatory breath test would be needed (as well as notifying the employee of the need). FRA estimates that about 5 percent of positive alcohol tests require confirmatory breath tests and that it takes approximately 30 minutes to conduct a confirmatory test. Confirmatory breath test costs at that rate are not significant, and Costs to provide notice to the employee is minimal (assuming it takes one hour to prepare a notice which is distributed to testing personnel for use).

Note that in some instances, a person may be short of breath (for example, due to allergies), requiring another test attempt. As these cases are expected to be infrequent, costs are assumed to be trivial.

Testing may result in some administrative burdens, such as employees signing consent or release forms to provide their test information to a third party. FRA estimates that only .06 percent of employees make such request, and assumes costs will be negligible (as did the NPRM regulatory evaluation).

FRA notes that EBT's are already being used and maintained, and are therefore not a regulatory burden of this rule.

Random Drug Tests

Accounting for random drug test costs includes the same cost elements as discussed previously under Subpart F - Pre-employment Drug Tests. To reiterate, only railroad operations not excepted by the 10-mile limited haul exception are applicable for random drug testing, namely some activities by CN and SLR.

As for pre-employment testing, the largest cost component is collection, shipping, and testing of specimen samples. The twenty-year (NPV) costs for this task is estimated at \$30,211. Negative drug test results represent the second highest cost for a random drug test program, at a twenty-year NPV of \$3,331. Other cost items are shown in Exhibit 2.

Alternative Compatible Testing Program

The Final Rule allows for foreign railroads to submit an alternative, compatible alcohol and drug program established under the laws of the foreign railroad's home country. If approved by FRA's Associate Administrator for Safety, the program would serve as an alternative to the return to service requirements of subpart B and the requirements of subparts E, F, and G of part 219. The alternative program must also use testing procedures, criteria, and assays comparable in effectiveness to all applicable provisions of DOT's workplace drug and alcohol testing programs (49 CFR part 40). The foreign railroad must maintain a letter on file indicating that it wants to follow the alternative program for its U.S. operations.

In FRA's consultations with Mexico, Mexico indicated its plans to implement a regulation similar to part 219. Analogous to part 219, Mexican railroads would submit their compliance programs with the Mexican Secretaria de Comunicaciones y Transportes (SCT), as U.S. railroads submit their plans with FRA. With the option for FRA to approve an alternate, compatible program, Mexican railroads with operations in the U.S. can file a letter with FRA to follow their home country's program for both Mexican and U.S. railroad operations. There will be no need to comply with two separate programs, thus reducing regulatory burden. In light of Mexico's desire to establish a regulation similar to part 219, FRA assumes that only Mexican railroads will use this option.

The costs of this option will be FRA's labor costs to review letters of intent from Mexican railroads. An internal review and approval time of 2 hours is used for estimation, at a GS-14, step 1 salary level, for four railroads, resulting in twenty-year NPV costs of \$359 (rounded).

Subparts I (Annual Report) and J (Recordkeeping Requirements)

The focus of the current rule is to enhance safety by making the riskier operations of foreign railroads (those that enter U.S. territory for more than 10 route miles) subject to additional provisions of FRA's alcohol and drug program, codified in part 219. This Final Rule extends subparts E, F, and G to FRFB employees unless otherwise excepted. Note that FRFB employees are already governed by all other requirements of part 219 and will continue to be (unless

excepted). As these other subparts are pre-existing requirements, they are not a cost of the actions in this Final Rule.

Additional Potential Costs

A disadvantage of the 10-mile limited haul exception is that it may bias foreign railroads to conduct operations that do not extend further than 10 miles into U.S. territory, perhaps leading to more exempt operations. The amount of exempt traffic within the 10-mile limited haul boundary could increase, increasing the risk of accidents or incidents. Note, however, that even in the absence of the 10-mile limited haul exception, most foreign railroad operations into the U.S. have been under 10 miles.

Canadian commenters indicated, in response to the NPRM, that the regulatory evaluation had either omitted or underestimated several significant cost burdens associated with the proposal and, therefore, the rule was not cost-beneficial. These additional costs that were identified included: (1) the likelihood of an increase in the pool of employees who would be subject to the proposed requirements; (2) the train delays associated with crews' refusals to submit to random testing; (3) the litigation expenses of defending challenges to random drug testing; (4) the need to make reasonable accommodations for persons with substance abuse problems, who are considered to be disabled under Canadian law; and (5) back pay and other compensation paid to employees out of work due to positive drug test results or treatment for substance abuse.

Many of these concerns have been answered throughout this evaluation. With the 10-mile limited haul exception, the pool of affected FRFB employees has decreased. The number of FRFB employees was corrected per submitted comments. The other costs that were identified were not included in this analysis due to the fact that they are burdens that result from either Canadian requirements or policies, or unnecessarily costly implementation decisions by Canadian railroads, but not from the requirements of this Final Rule.

Miscellaneous

A cost category to account for costs otherwise not accounted for in other cost sections is provided. Such costs may be reporting, testing, administrative, and logistical in nature. This category also includes costs that were noted as being minor in the above descriptions. FRA estimates these miscellaneous costs at \$3,000.

8.0 Total Twenty-Year Costs

Twenty-year compliance costs (NPV) associated with this Final Rule are expected to total about \$86,471.29 (shown as \$86,472 earlier in “Findings”, for convenience) for Canadian railroads that are not excepted under the 10-mile limited haul exception.

9.0 Benefits

The benefits of the Final Rule lie in its normative value to society. This rule is a positive measure to secure the safety of domestic railroad safety. Unfortunately, accident data for cross-border railroad operations is not separately identified in FRA’s database, making it difficult to predict the potential number of incidents that may be prevented by the rule. The regulatory evaluation for the NPRM presented statistics on the effectiveness of FRA’s alcohol and drug policies. FRA’s experience has shown that part 219 is effective in reducing employee impairment and thereby increasing safety. FRA feels that applying subparts E, F, and G to the foreign railroad operations that extend into the U.S., beyond 10 miles, will yield similar safety advantages.

In addition, overall compliance and the effectiveness of FRA’s domestic substance abuse program are dependent on fundamental support from the railroads and a belief on the part of their employees that the program is administered fairly. It is important, therefore, that all operating employees in the U.S. be subject to the same program to the extent practicable. This rule maintains the integrity of the program by subjecting both domestic and foreign-based employees operating in the U.S. to the same requirements, with the limited exception of the 10-mile limited haul exception.

10.0 Cost Benefit Comparison

The total twenty-year NPV costs from the rule are reduced significantly by the 10 mile border exception mandate, to about \$90,000. The benefits are not monetized because of the lack of previous accident data specific to cross-border operations. It is noteworthy, however, that preventing a single fatality or serious injury over the twenty year period of analysis will easily make the Final Rule cost beneficial.

11.0 Alternatives Considered

FRA considered alternative approaches to enhance safety with regard to increasing cross-border operations and fulfilling the requirements of the Omnibus Act. FRA considered adopting the NPRM as proposed, that is, applying all of part 219 to FRFB employees. FRA has seen a

deterrent effect from random testing and continues to feel that it is an important part of a substance misuse prevention program. FRA realized, however, that random testing would be less of a deterrent to Canadian employees who could still continue to work in their home country with positive test results. Also, if a train employee happened to refuse a random test, it would be more disruptive to the private sector than if a foreign trucker, subject to testing under FMCSA regulations, refused to take a test. Further, FRA lacks specific data on cross-border railroad operations' accident history because these data have not historically been separated in FRA's accident database. Respecting comments and taking into account other nation's laws, FRA chooses the 10-mile limited haul exception option.

FRA also considered the much less stringent approach of grandfathering Canadian and Mexican cross-border operations. Given the increasing cross-border train volume, this option is less certain to enhance safety in the future. The 10-mile limited haul exception reduces burden on foreign employees yet focuses on potentially risky, longer runs into the U.S.

12.0 Regulatory Flexibility Assessment

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires an assessment of the impacts of rules on small entities in the United States. This Final Regulatory Flexibility Assessment concludes, and the FRA certifies that, the requirements contained in this Final Rule are not expected to have a significant economic impact on a substantial number of small entities in the United States. FRA limits the applicability of subparts E, F, and G of part 219. The Final Rule includes an exception for railroads which have 15 or fewer *total* covered employees that are subject to the hours of service laws, and that do not operate on the tracks of another railroad or engage in joint operations, except for interchange. The requirement to include all covered employees, even if they worked in the U.S., helps focus regulatory relief on those railroads which are most likely to truly small entities. The Final Rule also provides an exemption from the reporting requirements of subpart I for railroads that have less than 400,000 total employee hours. The only small railroad that will be immediately affected by this rule is the SLR, which is part of the Genesee and Wyoming Inc. corporate family of railroads, which has extensive operations in the U.S. and four other nations, and is well equipped to facilitate compliance by the SLR.

Regarding laboratories that may be small entities, DOT-approved drug testing laboratories in the United States that are expected to perform the required testing already engage in this activity and have to comply with the requirements contained in part 219. No additional requirements for such laboratories will result from the rule. The only impact on these laboratories may be an increased business base for those that perform the additional drug tests. FRA expects a limited number of tests because of the 10-mile limited haul exception provided in this rule. The American Shortline and Regional Railroad Association (ASLRRA) represents the interests of most small freight railroads and some excursion railroads operating in the United States.

According to the ASLRRA, none of their members will be affected by the extension of applicability of control of alcohol and drug use.

EXHIBIT 1

RAILROAD EMPLOYEE COMPENSATION

United States

The AAR publishes Class I railroad average annual wages by employee group. The information for 2000 is used to develop the following average hourly rates and burdened hourly rates.

<u>Employee Group</u>	<u>Burdened</u> <u>Annual</u> <u>Wages⁶</u>	<u>Average</u> <u>Annual Wages</u>	<u>Burdened</u> <u>Hourly Rate</u>	
		<u>(40% rate)⁷</u>	<u>(2080 hrs/vr)</u>	
Executives, officials, & staff assistant		\$81,488	\$114,083	\$54.85
Professional & administrative	50,722	71,010	34.14	
Maintenance of way & structures		48,400	67,760	32.58
Maintenance of equipment & stores		44,578	62,409	30.00
Transportation, other than train & engine		54,179	75,850	36.47

⁶ AAR, Economics, Policy and Statistics Department, Railroad Facts; 2001 edition, p.57.

⁷ Straight hourly rates are burdened to include employee fringe benefits and overhead.

Transportation, train & engine

66,613

93,258

44.84